

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

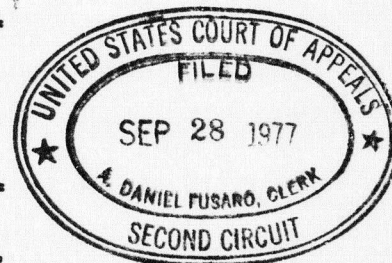
77-1316

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
LOUIS ACEVEDO,
Defendant-Appellant.
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B
P/S
Docket No. 77-1316

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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LOUIS ACEVEDO,
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Docket No. 77-1316

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Whether this case presents any non-frivolous issues to be raised for this Court's consideration on appeal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jack B. Weinstein) rendered on July 20, 1977, after a trial before a jury, convicting appellant Louis Acevedo of two counts of unlawful distribution of heroin, two counts of possession with intent to distribute, and conspiracy to distribute. He was sentenced to seven years' imprisonment plus a seven-year special parole term on each count, the sentences to run concurrently. He is currently released on bail pending the determination of this appeal.

By order of this Court dated July 29, 1977, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Acevedo was indicted,* along with Carlos Rivera, for conspiracy to distribute heroin between November 4 and 15, 1976, as well as the substantive offenses of distributing heroin and possessing the drug with intent to distribute on November 15, 1976. The indictment also charged appellant alone with dis-

*The indictment is B to the separate appendix to appellant's brief.

tribution and possession with intent to distribute a quantity of heroin on September 23, 1976. Following a one-day jury trial, appellant and Rivera were convicted of all counts.

A. The Government's Case

The Government presented two witnesses: Agents Dwight Rabb and Fred Moore of the Drug Enforcement Administration. On September 23, 1976, Rabb arrived at the home of appellant Acevedo's brother with Mike Soto, a confidential informant,* who had set up the transaction (16, 32). Appellant entered the house a short time afterward and said that the two ounces of heroin were ready. He returned an hour later with the drugs,** which he exchanged for \$3,400 (18-20). In response to Rabb's request, appellant stated that he could supply the agent with narcotics on a regular basis (20).

On November 4, 1976, appellant communicated to Rabb that he was ready to conduct another sale. He promised that the narcotics would be of a higher quality than those transferred the previous time (about which the agent had complained), because he had a different source (23). On November 15, with

*The informant was made available to the defendants, but neither called him as a witness (4-5). (Numerals in parentheses refer to pages of the trial transcript.)

**The defense stipulated that the packages allegedly transferred to Agent Rabb in the two transactions contained heroin (30-31).

agents surveilling the area,* Rabb parked near appellant Acevedo's home and sent the informer inside (23-24). Soto returned with appellant and co-defendant Rivera, whom Acevedo introduced as "my man Carlos" (25). At Rabb's car, appellant took out three clear plastic bags of brown rock power, explaining that he had only been able to obtain three (rather than the agreed-upon four) ounces of heroin (25-26). Rivera kept his eyes on Rabb and his hands under his peacoat (25-26). Rabb alerted the other agents, who converged on the area and arrested appellant and Rivera (who had no weapon) (27, 47-48).

B. The Defense

The defense presented no witnesses.

C. The Charge, Verdict, and Sentence

Appellant Acevedo's counsel requested an agency charge on the ground that appellant had purchased the narcotics for the Government agent. The court denied the request, citing United States v. Masullo, 489 F.2d 217 (2d Cir. 1973) (71-73). Counsel then requested an instruction on entrapment. Upon the court's response that the Government could reopen to introduce Acevedo's prior drug offenses as well as the tapes of his con-

*Agent Moore saw two Spanish males, whom he could not identify, pull into the driveway of Acevedo's house several hours before the transaction (55, 63-64).

versations with the informant, counsel withdrew the request (74-75). There were no further requests or exceptions to the instruction* (112).

The defendants were convicted of all the charges** and, on July 20, 1977, appellant Acevedo was sentenced to seven years' imprisonment plus a seven-year special parole term on each count, the sentences to run concurrently.

POSSIBLE ISSUES ON APPEAL

I. The court's refusal to give a "procuring agent" instruction

Acevedo's counsel requested a "procuring agent" instruction to the effect that appellant should be acquitted if the evidence indicated that he was acting on behalf of the buyer rather than the seller. As this Court held in United States v. Masullo, 489 F.2d 217, 221 (1973), such a defense

... has no present application where the charge is not sale but rather distribution or possession with intent to distribute. The statute (21 U.S.C. §§802(10) & 802(11)) defines "dispense" and "distribute" to mean "deliver" and the term "deliver" is defined to mean "the actual, constructive, or at-

*The complete text of the District Court's charge is C to the separate appendix to appellant's brief.

**Rivera's conviction was affirmed in open court on September 27, 1977 (Docket No. 77-1247).

tempted transfer of a controlled substance, whether or not there exists an agency relationship" (21 U.S.C. §802(8)).

See United States v. Marquez, 511 F.2d 63 (10th Cir. 1975); United States v. Pierce, 498 F.2d 712 (D.C. Cir. 1974); United States v. Ortiz, 496 F.2d 705 (2d Cir. 1974). Thus, the court below acted in accord with the law of this Circuit in refusing to give the agency instruction.

II. The entrapment issue

The defense attorney withdrew his request for an entrapment instruction when the court stated that the Government could reopen its case to introduce proof of Acevedo's prior drug offenses and his conversations with the informant. This evidence was relevant because, when an entrapment defense is raised, "the controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." Sorrells v. United States, 287 U.S. 435, 451 (1932), quoted in United States v. Steinberg, 551 F.2d 510, 513 (2d Cir. 1977). The Government bears the burden of proving beyond a reasonable doubt that the defendant was predisposed to commit the crime. United States v. Martinez-Carcano, Doc. No. 77-1041, slip op. 4325, 4330 (2d Cir., June 21, 1977). Since the prosecution did not anticipate an entrapment defense, the court properly offered the Government the opportunity to show an existing course of criminal

conduct similar to the crime charged in this case or a ready response to the Government's inducement. United States v. Viviano, 437 F.2d 295, 299 (2d Cir. 1971).

III. Credibility of witnesses

The only witnesses presented by the prosecution were agents of the Drug Enforcement Administration, whose testimony was basically consistent. The defense produced no witnesses and failed to show serious contradictions in the agents' testimony. Therefore, the facts in the case raise no issue of credibility as a matter of law, and the jurors' decision is not reversible.

IV. Sufficiency of evidence on the conspiracy count

Appellant Acevedo was indicted for conspiring between November 4 and 15, 1976, with Carlos Rivera, "along with others known and unknown to the Grand Jury," to distribute a quantity of heroin. Even if there was insufficient proof of Rivera's participation,* the record contains evidence of Acevedo's conspiracy with others. In his conversations with Agent Rabb, he spoke of his various sources. Additionally, Agent Moore had seen a car containing several unknown Spanish males pull into Acevedo's driveway shortly before the November 15 transaction. Thus, the jury could conclude that others were involved. See United States v. Green, 421 F.2d 1237, 1238 (2d Cir. 1970).

*This Court has already rejected Rivera's claim of insufficient proof against him by affirming his conviction in open court.

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues in this case to be presented for consideration by this Court; accordingly, an order should be entered relieving The Legal Aid Society, Federal Defender Services Unit, as counsel for appellant Louis Acevedo.

Respectfully submitted,

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Of Counsel.

September 28, 1977

CERTIFICATE OF SERVICE

September 28, 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Barry Bassi

